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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER.

ANDREW G. HALEY,
WM. P. LORD,
JOHN P. HANNON,
T. WALTER GILLARD,
Counsel for Petitioner.

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Respondent.

BRIEF OF PETITIONER ON THE QUESTION.

Statement.

A requested writ of certiorari was granted by this court on November 18, 1935, limiting the question to be considered to the application of this controversy to the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway. For the sake of brevity the court is referred for a statement of the case to the petitioner's *brief in support of petition* (pp. 1-12, inclusive). The respondent filed no brief in connection with the petition for writ of certiorari, but has recently submitted a brief on the merits.

Argument.

Article XIII of the Treaty Between the United States and the Kingdom of Norway and Sweden was Abrogated on July 1, 1916. Several Years Before This Cause of Action Arose.

A few weeks after the Seaman's Act of March 4, 1915[1] became law, the Secretary of State sent a circular to Minister O'Rear (May 29, 1915) which read in part as follows:

> "SIR: By direction of the President, I enclose herewith a copy of an act of Congress of the United States, approved March 4, 1915, entitled 'An Act To Promote the Welfare of American Seamen in the Merchant Marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea.'
>
> "It is deemed appropriate that an explanation be made of the origin of the legislation * * * many events occurred immediately prior to the present legislation which have profoundly influenced and moulded public sentiment * * * as to the necessity for the protection of seamen in their natural rights as a class of laborers, theretofore discriminated against in comparison with the treatment accorded by law to all other classes of workmen. * * * It is * * * clearly shown by Article XVI of the Act that the intent of Congress was not to disturb the great and valuable treaties now existing between the Government of the United States and other countries, negotiated from time to time with so much care and with so much patience, but by appropriate legislation to correct and regulate the long-existing and varying methods of procedure in matters affecting seamen. That such methods of procedure and standards of conduct towards seamen generally have not advanced, as should have been the case, coincident with the treatment of other classes of labor is believed to be so well estab-

lished as to need no comment, and the President feels, therefore, that, when all the facts and circumstances attendant upon the passage of the Act and of the purposes actuating the Congress in its passage are fully considered by the other Governments whose treaties may be affected in parts, no serious difficulties will be found to exist to delay or to prevent an agreement for the mere abrogation or omission of the respective articles found to be inconsistent with the provisions of the Act. * * * an exchange of notes will be regular and effective because of the authority already granted to the President by Section XVI of the Act to abrogate the portions of the treaties inconsistent therewith. Hence, it will be perceived that the intent of Congress may be fully realized by informal agreements between the Government of the United States and other powers, and that in this way the various important treaties now subsisting may remain in full force and effect, with the exception of the articles relating to seamen * * * I am (etc.) W. J. Bryan."

This circular was transmitted the same *mutatis mutandis*, to the American missions in Austria-Hungary, Belgium, Brazil, China, Colombia, Denmark, France, Greece, Italy, Netherlands, Norway, Roumania, Spain and Sweden.[2]

Pursuant to these instructions and in conformity with Section XVI of the Act, the Norwegian Government was notified of the abrogation of Articles XIII and XIV. A lengthy correspondence ensued which finally culminated in the receipt of a note dated April 9, 1919 from the Norwegian Minister. A copy of this note (certified by the Department of State) is annexed hereto and by reference made a part hereof. For convenience it is quoted:

"Washington, April 9, 1919.

My Dear Mr. Acting Secretary of State:

In your note of February 27, 1919, relating to the exchange of notes between your Department and myself

of February 1, 1919, you have called my attention to the fact that in withdrawing the denunciation of the Treaty of July 4, 1827, except as to Articles XIII and XIV, the Government of the United States understands so far as the laws of the United States are concerned that these articles terminated on July 1, 1916. You presume that this is also the view of the Norwegian Government.

In reply to your said note I have the pleasure to inform you that I have been authorized by my Government to state to you that the Norwegian Government agrees to consider Articles XIII and XIV of the Treaty to have been terminated on July 1, 1916, in accordance with the Notification which the United States Minister at Christiania addressed to the Norwegian Government on June 24, 1915. I am (etc.). H. BRYN." (1 Foreign Relations, 1919, pp. 53 and 54; House Document No. 813, 66th Cong. 2d Session, pp. 53 and 54).

Thus Article XIII became a non-enity. It was abrogated and annihilated. No logic nor ratiocination can revive it so that in any manner it will have any application to this controversy. It was abrogated by the mutual consent of the high contracting parties. There was a meeting of the minds. The rights of the Norwegian Consuls in this country were limited and confined to the scope of the *jus gentium* in so far as that law is not in conflict with the statutes of our country or the decisions of our courts. As shown in the initial circular of the Secretary of State, America had accomplished another benefit for an oppressed class of laborers. The Treaty of 1827 minus the abrogated Articles XIII and XIV remained in effect until the ratification of the Treaty of Friendship, Commerce and Consular Rights between the United States and Norway on September 13, 1932.

The respondent contends that the abrogation of Article XIII by the State Department was *ultravires*. The peti-

tioner maintains that this is a striking instance of action on the part of the State Department which was predicated on an express mandate of Congress. However, there is no provision of the Constitution or of the law which prohibits the President from abrogating a treaty or a portion thereof.

The Convention between the United States and Mexico to prevent smuggling and for certain other objects was signed December 23, 1925, ratified March 11, 1926, and proclaimed March 18, 1926. It went into effect so far as the United States was concerned upon March 28, 1926. By its terms the Convention was to remain in force for one year, upon the expiration of which period, if no notice of a desire to terminate it had been given by either party, it was to continue in force until thirty days after either party should give notice of termination. Upon due consideration the State Department concluded to terminate the treaty at the expiration of the year, and accordingly gave the appropriate notice to the Government of Mexico. This was done without authority of Congress. President Taft without authority of Congress or of the Senate gave notice of the termination of the Treaty of 1832 between Russia and the United States (Public Relations of U. S., 1911, pp. 695 et seq.). There are many other instances of termination of treaties by the Executive.

The Norwegian Consul (who interposed the exceptive allegations) was under no misapprehension concerning his rights. He followed the procedure approved by the Law of Nations and did not presume to enter the controversy under Article XIII or any other treaty provision.

Oetjen v. *Central Leather Company,* 246 U. S. 297, 62 Law Ed. 726-732:

> "The conduct of the foreign relations of our government is committed by the Constitution to the executive

> and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *United States* v. *Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *Foster* v. *Nielson*, 2 Pet. 253, 307, 309, 7 L. Ed. 415, 433, 434; *Garcia* v. *Lee*, 12 Pet. 511, 517, 520, 9 L. Ed. 1176, 1178, 1179; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420, 10 L. Ed. 226, 228; *Re Cooper*, 143 U. S. 472, 499, 36 L. Ed. 232, 240, 12 Sup. Ct. Rep. 453.''.

It is patent that the court below was not advised by counsel of the abrogation of Article XIII of the treaty. On the one hand it quotes the defunct Article XIII and many cases adjudicated under similar Articles in other treaties all of which were also abrogated, and on the other hand it makes no mention of the Seaman's Act. Because of the contention that the treaty stipulation was still in force and effect the disabled seaman Van Der Weyde was deprived of his right of recourse to the courts of the United States. The Circuit Court quotes with approval from *Heredia* v. *Davies* (C. C. A.-4), 12 F. (2d) 500, the following language:

> ''In the absence of treaty stipulation, the courts of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of this country. *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *The Roxen* (C. C. A. 4th), 11 F. (2d) 55, decided January 14, 1926; *Elder Dempster Shipping Co.* v. *Pouppirt* (C. C. A. 4th), 125 F. 732, 60 C. C. A. 2d), 255 F. 846, 167 C. C. A. 174; *The Ester* (D. C.), 190 F. 216.''

Here is a case in which a seaman, resident of the United States for many years (being a citizen of the Netherlands) shipped on a Norwegian vessel under charter to an Oregon corporation. He suffered actionable injuries. The Norwegian Consul time after time promised proper relief but it was not forthcoming. He appealed to the Minister from

his own country, but here too he was informed that relief was not to be had. We know of no case of a similar nature in the history of American jurisprudence where relief was denied to an applicant before the bar of an American court. On the other hand, there are several instances where a lower court dismissed such causes in a mistaken impression that its jurisdiction was discretionary, whereas in fact the higher courts held that to dismiss the cause was an abuse of discretion. Such is the rule of law as is shown by the following cases:

> *The Belgenland,* 114 U. S. 355, 368-69: "This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is preeminently one *communis juris,* and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: 'The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is the court of admiralty within the reach of whose process they may both be found.' *Bernhard* v. *Greene,* 3 Sawyer 230, 235."

> *The Eir, Persson* v. *Falsen,* 60 Fed. (2d) 55; 125: "Here the seaman's only adequate remedy was the action he brought in the court of the United States,

and he would be denied this relief if required to resort to the courts or officials of far distant Norway. * * * It seems to us that to deny jurisdiction of this cause was error".

Elman v. *Moller*, 11 Fed. (2d) 55; 57: "We think, however, that the court below erred in declining jurisdiction in his case. Even a foreign ship cannot, when in an American port, forcibly compel one of its crew, albeit an alien, to serve against his will. If he alleges that such attempt has been made, we believe that an American court is bound to hear his complaint and give him such redress, if any, as he may show he should have. * * * The courts should act promptly and vigorously to vindicate all the rights of seamen, as well those recently conferred on them, as those which date from time immemorial. We doubt not that even now they will often need all the protection that can be given them."

The Sounderborg, (Atkies Dampskibsselskabet Dounebrog et al. v. Mikkelson et al.), 47 Fed. (2d) 723 (C. C. A.-4) "It is contended on behalf of the appellants that, since this is a controversy with respect to wages between a foreign master and ship on the one hand, and foreign seamen on the other, this court should not take jurisdiction. The circumstances under which a federal court will take jurisdiction were discussed in The Roxen (D. C.) 7 F. (2d) 739 (affirmed by this court, Elman v. Moller, 11 F. (2d) 55), where it was held that jurisdiction should always be taken in any case in which the refusal would result in a denial of justice. On this point, as we see it, the judge, below in assuming jurisdiction correctly said: 'In this case, as has been pointed out, libelants were signed on in an American port for return, upon the expiration of the voyage, to an American port. They intended and intend to remain in the United States as long as they are undisturbed by the immigration authorities, and this, of course, depends upon their compliance with the acts of Congress with relation to foreign seamen. Not only, therefore,

would their contract entitle them to a discharge in the United States, but this in fact occurred. To hold, therefore, that their only remedy was by appeal to the courts of Denmark would be a clear denial of justice."

The Tricolor, 1933 A. M. C. 919: "Both sides concede that the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the district court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all".

Comment on Respondent's Brief.

Respondent states that the petitioner sets forth the contention of abrogation of the treaty by the Seaman's Act of 1915, in an "amosphere of * * * tacit concession without suggestion that the terms of "the treaty were not (sic), comprehensive enough to cover a claim of this character", and that "such a premise not entering a consideration of the jurisdictional question seems justified by the plain language in Article XIII of the Treaty of 1827 * * * ". The petitioner denies the implication of these statements. The plain fact is that Article XIII was abrogated by operation of an Act of Congress long before the cause of action arose, and the petitioner has heretofore recognized and asserted this to be a fact.[3]

The respondent then cites a long series of cases arising under Article XIII of the Treaty in question and under similar Articles contained in other treaties. The following cases cited have no place in a discussion of the merits of this cause (except as they support the view of petitioner) as the treaty law under which they were adjudicated has long since been abrogated:

Wildenus' case, 120 U. S. 1, 30 L. Ed. 565.[4]

The Rindjani, 254 Fed. 913 (C. C. A. 9).[5]

The Elwine Kreplin, Fed. Cas. 4426 (C. C.).[6]
The Buchard, Fed. 608 (D. C.).[7]
The Marie, 49 Fed. 286.[8]
The Wellhaven, 55 Fed. 80.[9]
The Bound Brook, 146 Fed. 160 (D. C.).[10]
The Ester, 190 Fed. 216.[11]
The Cambitsis, 14 F. (2d) 236.[12]

The respondent then launches into a learned and sincere effort to show that despite the abrogation of Article XIII by the mutual consent of this country and the Norwegian Government long before the cause of action arose, that nevertheless the Article still subsists in so far as this controversy is concerned. He uses the following logic:

The Seaman's Act did not expressly name the Articles of each treaty to be abrogated, the Seaman's Act was not inconsistent with all of the provisions of Article XIII: The State Department acted *ultravires* in abrogating the whole of Article XIII. The State Department is guilty of "a surprisingly loose and inexcusable construction of the Seaman's Act," and finally the respondent summarizes "In other words, if the action of the State Department (never ratified by the Senate) as to Article XIII was beyond the direction and intent of the Seaman's Act of 1915, such action was not only a misconstruction of that statute, but, in effect, an encroachment upon constitutional segregation of powers by the executive upon the legislative branch of government—most cancerous when least conspicuous."

Neither the underlying law nor the record of this patient diplomatic negotiation justifies the above intemperate quotations nor the points made by the respondent. The history and record of the enactment of the Seaman's Act shows that it was in no way sponsored by the State Department. However, when the Act became law, pursuant to the mandate of Congress and the directions of the Presi-

dent, the department proceeded to an orderly and skillful adjustment of existing treaties in conformity therewith. This long negotiation is one of the brightest stars in the diadem of American efforts on behalf of the oppressed and the afflicted.

Counsel devotes several pages of his brief to the subject of treaty making power and the abrogation of treaties.[13] In view of the facts involved in this case, his citation of authorities, where applicable at all to the issue, squarely support the view of the petitioner. He cites the following cases as showing that no decision would embarrass this Court in sustaining the ruling of the Circuit Court of Appeals for the Ninth Circuit:

Sandberg v. *McDonald*, 248 U. S. 184, 63 L. Ed. 200.

Neilson v. *Rhine Shipping Co.*, 248 U. S. 205, 63 L. Ed. 208.

Strathearn Steamship Co. v. *Dillon*, 252 U. S. 348, 64 L. Ed. 607.

Thompson v. *Lucas*, 252 U. S. 358, 64 L. Ed. 612.

Jackson v. *The Archimedes*, 275 U. S. 463, 72 L. Ed. 374.

Yet, an examination of the above cases shows that in each case the court took jurisdiction. In fact the *Strathearn* case is a classic example of why the State Department was forced to abrogate Article XIII in its entirety. That case required the court to consider Section 4 of the Seaman's Act (that Section amends paragraph 4530 U. S. revised statutes; Comp. Stat., paragraph 8322, 9 Fed. Stat. Anno., 2d Ed. Page 158). For the purpose of adjudicating certain claims the section expressly opens the courts of the United States to all seamen on foreign vessels while in the harbors of the United States. This provision of the Seaman's Act is directly in conflict with Article XIII, and there is no language in the Article whereby an exception

could be made to accommodate the statute. In other words, the statute simply vitiates the Article.[14]

We respectfully urge that a decree be entered directing the District Court to proceed to the trial of the case on the merits. It is true that the opinion of the Circuit Court did not raise the question of abuse of discretion by the District Court, and that the writ herein properly limited the appeal to the treaty question. But it is hoped that this Court, in rendering its opinion, will aid and guide the bar by discussing the merits of the cause (*Oetjen* v. *Central Leather Co.*, *supra*). This is particularly desired in view of the fact that The Eir (C. C. A. 4) *supra* is almost identical with this case as to the facts. (See pp. 17 and 18 of brief in support of petition.)

ANDREW G. HALEY,
Washington, D. C.;
WM. P. LORD,
JOHN P. HANNON,
T. WALTER GILLARD,
Portland, Oregon,
Counsel for Petitioner.

Footnotes.

[1] 38 Stat. at L. 1164, Chap. 153, Comp. State. Para. 8306, 9 Fed. Stat. Anno. 2d Ed. p. 145.

[2] A complete list of the treaties (with the particular articles noted) affected follows:

Austria-Hungary, May 8, 1848. Article IV.
Austria-Hungary, July 11, 1879. Articles XI and XII.
Belgium, March 9, 1880. Articles XI and XII.
Bolivia, May 13, 1858. Article XXXIV.
Brazil, Dec. 12, 1828. Article XXXI.
China, June 18, 1858. Article XVIII.
Colombia, Dec. 12, 1846. Article XXXIII.
Colombia, May 4, 1850. Article III.
Denmark, July 11, 1861. Articles I and II.
France, June 24, 1822. Article VI.
France, Feb. 23, 1853. Article VIII and IX.
Great Britain, June 3, 1892. The entire treaty.
Greece, Nov. 19, 1902. Articles XII and XII.
Italy, May 8, 1878. Article XIII.
Italy, Feb. 24, 1881. The entire treaty.
Kongo, Jan. 24, 1891. Article V.
Netherlands, Jan. 19, 1839. Article III.
Netherlands, May 23, 1878. Articles XI and XII.
Norway, July 4, 1827. Articles XIII and XIV.
Roumania, June 17, 1881. Articles XI and XII.
Spain, July 3, 1902. Articles XXIII and XXIV.
Sweden, July 4, 1827. Articles XIII and XIV.
Sweden, June 1, 1910. Articles XI and XII.
Tonga, October 2, 1886. Article X.

[3] Brief in Support of Petition, pp. 19-21.

[4] The treaty stipulation upon which this case was adjudicated was Article XI of the Convention between the United States and Belgium of March 9, 1880. This Article was abrogated in the same negotiation as was Article XIII of the Treaty of July 4, 1827, between the United States and the Kingdom of Norway and Sweden. For the sake of brevity, each footnote hereafter will merely show the pertinent abrogated article which formed the basis of adjudication in the cases cited.

[5] Treaty with the Netherlands of May 23, 1878, Article XI.

[6] Treaty with Prussia of 1828 (war time abrogation).

[7] Treaty with Germany of 1871 (war time abrogation).

[8] Treaty with the Kingdom of Norway and Sweden of 1827, Article XIII.

[9] Id.

[10] Treaty with Germany of 1871 (war time abrogation).

[11] Treaty with the Kingdom of Norway and Sweden of 1827, Article XIII.

[12] Treaty with Greece on November 19, 1902, Articles XII and XIII (this case was apparently decided without the court being apprized of the abrogation of the pertinent articles).

[13] Brief of respondent, pp. 37-44.

[14] For a further discussion of this case, see brief in support of petition pp. 20 and 21.